

1 Alan Abrams, Esq. (SBN: 75637)
2 Charles M. Coate, Esq. (SBN: 140404)
3 COSTA ABRAMS & COATE LLP
4 1221 Second Street, Third Floor
5 Santa Monica, California 90401
6 Tel: (310) 576-6161
7 Fax: (310) 576-6160
8 ccoate@cacllp.com
9 Attorneys for Lead Case Plaintiff
10 Upper Branch Productions, Inc.

11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

13 UPPER BRANCH PRODUCTIONS, INC.,
14 a California corporation,

15 Plaintiff,

16 vs.

17 INNERWORKINGS, INC., a Delaware
18 corporation, *et al.*

19 Defendants.

Lead Case No.: CV-12-8789 MWF (RZx)
Assigned to Hon. Michael W. Fitzgerald

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
OPPOSITION TO MOTION TO
DISMISS FIRST AMENDED
COMPLAINT; DECLARATIONS OF
CHARLES M. COATE AND JOSH
TIMONEN IN SUPPORT THEREOF**

[Evidentiary Objections Filed Concurrently
Herewith]

Date: January 28, 2013¹
Time: 10:00 a.m.
Place: Courtroom 1600

¹ On December 13, 2012, Plaintiff's counsel sent a "Notice of Unavailability of Counsel" to counsel for Defendants stating that Plaintiff's lead counsel would be unavailable from January 2-6, 2013. Despite such advance knowledge of a scheduling conflict, *pro hac vice* counsel for Defendants has unilaterally selected this hearing date in violation of Local Civility Guidelines to ensure that Plaintiff's lead counsel would have little opportunity to participate in this Opposition. (*See* U.S.D.C. C.D. Cal. Civility and Professionalism Guidelines, §§ B.2, B.3.)

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12	<i>Niles v. Louis H. Rapoport & Sons, Inc.</i> 53 Cal.App.2d 644, 128 P.2d 50 (1942)	22
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10	Central District Civility and Professionalism Guidelines, §§ B.2, B.3	1, fn1
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1 **I. INTRODUCTION**

2 Defendants'² motion to dismiss ("Motion") Plaintiff's first amended complaint
3 ("FAC") for failure to state a claim upon which relief can be granted is properly denied in
4 its entirety. This copyright infringement action arises out of a dispute between the parties
5 regarding unauthorized manufacture and exploitation by defendants with respect to the
6 copyrights owned by Plaintiff in fifteen (15) audio-visual works ("Works").

7 Defendants claim that there are not enough connections with this forum to support
8 personal jurisdiction over individual defendants Dawkins, Robin Cornwell, and Mike
9 Cornwell ("Individual Defendants"). Nonsense. Plaintiff, in California, created the
10 Works at issue at Plaintiff's cost contrary to the misrepresentations by Defendants in their
11 Motion, and the wrongful conduct of these Individual Defendants was targeted at
12 Plaintiff in California, who they knew was a California company. Moreover, California
13 is the state in which most, if not all alleged tortious conduct of the Individual Defendants
14 occurred. Under the *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804
15 (1984) "effects" test Defendants clearly directed their activities at this forum and this
16 Court's exercise of personal jurisdiction over them is proper.

17 Moreover, in October 2010, Dawkins came to California and, together with RDF,
18 filed a civil action³ against Plaintiff, Josh Timonen, and Maureen Norton concerning the
19 exact same failed business relationship at issue here, and, *inter alia*, sought a declaration
20 of ownership of the copyrights in the Works ("First Action"). Upper Branch removed the
21 First Action to this district court, whereupon Dawkins and RDF renounced all federal
22 relief and conceded that Josh Timonen was an independent contractor for Dawkins and
23

24 ² Collectively, defendants The Richard Dawkins Foundation for Reason and Science
25 ("RDF"), Richard Dawkins Foundation Store ("RDF Store"), Clinton Richard Dawkins
26 ("Dawkins"), Robin Elisabeth Cornwell ("Robin Cornwell"), and Michael Cornwell
27 ("Mike Cornwell") are referred to herein as "Defendants."

28 ³ Prior litigation between Dawkins/RDF and Upper Branch, *et al.*: Los Angeles Superior Court, Case No. EC054190 ("First Action").

1 RDF and that Plaintiff owned the copyrights in the Works. Upon remand to state court,
2 Dawkins and RDF proceeded to newly assert, on a non-exclusive license theory, an
3 intentional interference with prospective economic advantage claim against Plaintiff for
4 having instructed IWI's predecessor in interest to deny RDF access to Plaintiff's Works.
5 Thereafter, Dawkins and RDF voluntarily dismissed the First Action against Plaintiff, *et*
6 *al.*, with prejudice.

7 Plaintiff's enforcement of its copyrights in this forum against Defendants is not
8 driven by ulterior motives, but rather by an interest in redressing the harm caused to
9 Plaintiff by Defendants by their unlawful and infringing conduct. Although Plaintiff, *et*
10 *al.*, elected to proceed against Dawkins and RDF in a second action⁴ to specifically
11 address the litigation conduct of Dawkins, RDF, and their counsel in the First Action, the
12 matter of the \$55,000 in attorney's fees, reduced from Bryan Cave's astronomical request
13 for over \$250,000 on one motion after the court determined that Bryan Cave engaged in
14 the unnecessary practice of law, is anticipated to be mooted on appeal.

15 In any event, RDF's filing of yet another lawsuit against Plaintiff Upper Branch,
16 related case no. CV 12-10694, in their belated attempt to resurrect their First Action that
17 it previously dismissed with prejudice, ironically demonstrates that the argument
18 Dawkins, *et al.*, relied upon in the Second Action, *i.e.* that they dismissed the First Action
19 with prejudice in order to avoid costly legal fees, now rings hollow, and that they come to
20 this Court with unclean hands.

21 In sum, the prior litigation, the preexisting failed business relationship among the
22 parties, and Defendants' prior judicial admissions that Plaintiff owns the copyrights in the
23 Works, conclusively demonstrates that these Defendants have adequate notice of how
24 Plaintiff's factual allegations align with its asserted legal claims. At a minimum, the
25 FAC puts Defendants "on notice" of the legal claims being made against them as well as
26

27 _____
28 ⁴ Prior litigation between Dawkins/RDF and Upper Branch, *et al.*: Los Angeles Superior
Court, Case No. EC057388 ("Second Action").

1 the underlying factual underpinning, easily satisfying Fed. R. Civ. P. 8. *Id.* Additionally,
 2 Plaintiff's FAC states claims for relief that are plausible on their face and Defendants
 3 Motion is thus properly denied in its entirety.

4 **II. SUMMARY OF RELEVANT FACTS**

5 Plaintiff Upper Branch Productions, Inc. ("Plaintiff" or "Upper Branch") is a
 6 California corporation, (FAC (Dkt #19) ¶3) that owns several federally registered
 7 copyrights for fifteen (15) audio-visual works ("Works"). (FAC ¶¶ 13-15; FAC Ex. A.)
 8 Upper Branch created and sold these Works from its principal place of business in the
 9 Los Angeles area. (FAC ¶¶ 21, 23, 25.)

10 It brings this action against Defendants InnerWorkings, Inc. ("IWI"), Richard
 11 Dawkins Foundation For Reason and Science ("RDF"), Richard Dawkins Foundation
 12 Store ("RDF Store"), Richard Dawkins ("Dawkins"), Robin Cornwell ("Cornwell"), and
 13 Michael Cornwell ("Cornwell") [collectively herein all Defendants except IWI⁵ are
 14 referred to herein as "Defendants".]

15 Josh Timonen ("Timonen") the independent contractor who designed and
 16 developed two websites for Dawkins (FAC ¶ 20) was a California citizen who, after
 17 building those websites filed a fictitious business name and then subsequently formed
 18 Plaintiff Upper Branch, a California production company. (FAC ¶ 3.)

19 Plaintiff Upper Branch was formed in 2007 to own and operate an online store and
 20 to promote its products. (FAC ¶ 21.) The products created and sold by Plaintiff were
 21 specifically aligned with the causes advanced by Dawkins and RDF. (FAC ¶ 22.) The
 22 parties were neither competitors nor partners but were friendly with one another at the
 23 time the store was created by Plaintiff. (See FAC ¶ 20, 21, 22, 23.) Dawkins was
 24 concerned of the appearance that his nameksake foundation was profiting from his
 25

26
 27 ⁵ IWI belatedly filed an Answer (Dkt #22) to Plaintiff's FAC on December 27, 2012,
 28 when such responsive pleading was due on December 24, 2012 based on Plaintiff's filing
 and service of its FAC on IWI on December 10, 2012. Fed. R. Civ. P. 15(a)(3) (14 days).

1 personal works and therefore Dawkins disclaimed any connection to Plaintiff's
2 merchandising business. (See FAC ¶¶ 22-24.)

3 Timonen on behalf of Plaintiff proposed to Dawkins that Plaintiff could create
4 such Works, and thereafter Plaintiff created the Works, and sold those Works to the
5 public. (See FAC 21 - 25.) Timonen proposed to Dawkins that Timonen could donate
6 certain profits from the Plaintiff's store operation to RDF. (FAC ¶ 24.) In response,
7 Dawkins told Timonen that he was not "moral[ly]" obligated to do so. (FAC ¶ 24.)

8 Plaintiff sourced its own manufacturer to produce copies of the Works and
9 deposited its master copies with Idea Media Services, LLC, IWI's predecessor-in-
10 interest, so that such manufacturer could replicate copies of the Works for Plaintiff on a
11 per-order basis as requested by Timonen or Norton on behalf of Plaintiff, only. (FAC ¶
12 17.)

13 At the end of 2009, Timonen was informed by Dawkins and Robin Cornwell on
14 behalf of RDF that RDF was interested in buying out Plaintiff's store operation. (FAC ¶
15 26.) Because the parties remained on friendly terms at such time, Timonen on behalf of
16 Plaintiff agreed to transfer all of Plaintiff's store assets, including tangible inventory of
17 Works and written copyright assignments for the Works, provided Plaintiff was
18 compensated for its inventory and the costs and liabilities Plaintiff incurred as a result of
19 the conveyance, transfer, and assignment of assets to RDF and related matters. (FAC ¶
20 27.) From the end of 2009 until the time that Mike Cornwell and other RDF agents took
21 physical possession of Plaintiff's store assets from its offices in Los Angeles, California,
22 Dawkins and Robin Cornwell on behalf of RDF at all times led Timonen and Norton on
23 behalf of Plaintiff believe that RDF intended to compensate Plaintiff for inventory, costs
24 and liabilities. (FAC ¶ 28-31.) RDF took physical possession of Plaintiff's assets, and
25 obtained written copyright assignments for just two (2) of the Works, but never
26 compensated Plaintiff for the same, as was agreed. (FAC ¶ 31.) Plaintiff did not assign
27 copyrights for the other thirteen (13) Works. (See FAC ¶ 33.)
28

1 Instead of compensating Plaintiff, as RDF agents continuously represented and
2 as RDF had agreed it would, in October 2010, Dawkins and RDF instead sued Plaintiff,
3 Josh Timonen, and Upper Branch in Los Angeles Superior Court ("First Action"). (FAC
4 ¶¶ 41-42.) However, Dawkins and RDF later dismissed their entire case against Plaintiff,
5 *et al.*, with prejudice. (FAC ¶ 42.) Costs were awarded to Plaintiff, *inter alia*. (*Id.*)

6 However, in between the time that RDF took physical possession of Plaintiff's
7 assets and Dawkins and RDF filed the First Action against Plaintiff, *et al.*, Timonen had
8 learned that RDF through Dawkins, Robin Cornwell and Mike Cornwell had placed
9 direct orders with Plaintiff's manufacturer for copies of Plaintiff's Works, Timonen
10 demanded and again reiterated to Plaintiff's manufacturer that neither RDF, nor anyone
11 purporting to represent RDF, had Plaintiff's authorization to place direct orders for copies
12 of Plaintiff's Works. (*See* FAC ¶ 37.) Plaintiff had also demanded RDF to immediately
13 return Plaintiff's assets. (FAC ¶ 38.)

14 Idea Media ignored Plaintiff's assertion of exclusive rights under copyright and
15 starting in June 2010 continued to copy and distribute copies of Plaintiff's Works to RDF
16 without Plaintiff's authorization. (FAC ¶ 37.)

17 RDF has ignored Plaintiff's assertion of exclusive rights under copyright and the
18 Defendants continue to maintain their right to continue distributing and exploiting the
19 Works without Plaintiff's authorization, and without compensating Plaintiff. (*See* FAC ¶
20 39.)

21 None of the Defendants are authorized by Plaintiff to exploit, reproduce, adapt,
22 distribute, sell, and/or perform Plaintiff's Works, or any of them. (FAC ¶ 40.)

23 Defendants produced documents to Plaintiff in the First Action that evidenced e-
24 mail communications between Idea Media and Individual Defendants concerning
25 Individual Defendants requests for copies of the Works, representations that RDF owned
26 the copyrights in the Works, requests for removal of Plaintiff's copyright and logo from
27 the packaging of the Works, and the submission of new artwork files for Idea Media to
28 create and utilize in connection with the unauthorized copies of Plaintiff's Works Idea

Media agreed to produce for RDF's payment, despite specific notice from Plaintiff that all of the above actions were not authorized by Plaintiff. (FAC ¶¶ 43-52.)

Accordingly, this action follows and for reasons stated herein, Defendants' untimely Motion is properly denied in its entirety⁶.

III. INDIVIDUAL DEFENDANTS⁷ ARE SUBJECT TO THE PERSONAL JURISDICTION OF THIS COURT.

When opposing a jurisdictional challenge made absent an evidentiary hearing, a plaintiff is required only to make a prima facie showing of jurisdictional facts to withstand the motion to dismiss. *See, e.g., Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003). For purposes of Plaintiff's prima facie showing of personal jurisdiction, uncontroverted allegations in the FAC must be taken as true and conflicts between the facts contained in the parties' affidavits must be resolved in Plaintiff's favor. *Brayton Purcell, LLP v. Recordon & Recordon*, 606 F. 3d 1124, 1130 (9th Cir. 2010) ("*Brayton II*"). If the Court decides the jurisdictional issue on the basis of the pleadings and supporting declarations, it must be presumed that the facts set forth therein can be proven. *See Omeluk v. Langsten Sliip & Batbyggeri A/S*, 52 F.3d 267, 268 (9th Cir. 1995).

When there is no federal statute controlling the Court's exercise of personal jurisdiction, federal courts must look to the forum state's jurisdictional statute to determine whether it is proper to assert personal jurisdiction. *See, e.g., id.* The California long-arm statute provides that "[a] court of this state may exercise jurisdiction

⁶ Defendants belatedly filed this Motion on December 27, 2012, and violated Local Rule 7-3 based on Defendants' first effort to conduct it obligatory pre-filing conference on Friday afternoon on December 21, 2012, preceding the Christmas holiday. (C.D. Cal. Local Rule 7-3.) Plaintiff's FAC was filed on December 10, 2012 (Dkt #19) and Defendants' responsive pleading was due on December 24, 2012. Fed. R. Civ. P. 15(a)(3) (14 days). Therefore, the instant motion may be denied as untimely.

⁷ The two moving corporate defendants, RDF and RDF Store, do not challenge this Court's jurisdiction over them. Defs.' Mot. Dismiss ¶ 5.

1 on any basis not inconsistent with the Constitution of this state or of the United States.”
 2 Cal. Civ. Proc. Code § 410.10. Thus, the Court’s jurisdictional analysis under California
 3 law and federal due process is the same. *Yahoo! Inc. v. La Ligue Control Le Racisme Et*
 4 *L’Antisemitisme*, 433 F.3d 1199, 1205 (9th Cir. 2006).

5 The Due Process Clause requires that a court exercise personal jurisdiction over a
 6 defendant only if the defendant has “certain minimum contacts” with the forum state
 7 “such that the maintenance of the suit does not offend traditional notions of fair play and
 8 substantial justice.” *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed.
 9 95 (1945) (internal quotation marks omitted). A court may exercise general jurisdiction
 10 over a defendant whose contacts with the forum are so “continuous and systematic” that
 11 personal jurisdiction is proper in any action. *Burger King Corp. v. Rudzewicz*, 471 U.S.
 12 462, 477-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). Absent general jurisdiction, a
 13 court may also exercise specific jurisdiction over a defendant where “jurisdiction [is]
 14 based on their relationship between the defendant’s forum contacts and the plaintiff’s
 15 claim.” *Yahoo!*, 433 F.3d at 1205.

16 **A. This Court Can Properly Exercise General Jurisdiction Over These**
 17 **Individual Defendants.**

18 The standard for establishing general jurisdiction requires that the defendant’s
 19 contacts be substantial enough to approximate physical presence. *Bancroft & Masters,*
 20 *Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). “Factors to be taken into
 21 consideration are whether the defendant makes sales, solicits or engages in business in
 22 the state, serves the state’s markets, designates an agent for service of process, holds a
 23 license, or is incorporated there.” *Id.* Occasional sales to residents of the forum state are
 24 insufficient to create general jurisdiction. *See Brand v. Menlove Dodge*, 796 F.2d 1070,
 25 1073 (9th Cir. 1986).

26 The declaration of Josh Timonen filed concurrently herewith in support of this
 27 Opposition demonstrates that these Individual Defendants *regularly* venture to California
 28 for the purpose of conducting business, in the form of attending fundraising events and/or

1 for the purpose of giving speeches related to RDF's mission and stated goals, and that
 2 such regular visits to California are advertised on Dawkins' website, richarddawkins.net.
 3 (See Declaration of Josh Timonen ["Timonen Decl."] filed in support of this Opposition
 4 ¶¶ 2-21.)

5 Defendants' argument that these Individual Defendants do not do business in this
 6 state is patently false, (Mot. at 7,) and it would not be unreasonable for the Court to
 7 exercise general jurisdiction over these Individual Defendants.

8 **B. In the Alternative, At a Minimum, the Court May Exercise Specific**
 9 **Jurisdiction Over these Individual Defendants.**

10 Individual Defendants have sufficient "minimum contacts" with California arising
 11 out of, or related to, their operation of the RDF Store website which sells unauthorized
 12 copies of Plaintiff's Works, their unauthorized inducement of IWI to manufacture
 13 unauthorized copies of Plaintiff's Works, their personal and material contribution to
 14 IWI's creation of unauthorized derivative artwork to accompany the DVD packaging of
 15 Plaintiff's Works, and other wrongful conduct that individually targeted Plaintiff here, to
 16 justify the exercise of specific jurisdiction in California.

17 In order for specific jurisdiction to exist: (1) the non-resident defendant must
 18 purposefully direct his activities at, or consummate some transaction with, the forum state
 19 or a resident thereof; or perform some act by which it purposefully avails itself of the
 20 privilege of conducting activities in the forum, (2) the Plaintiff's claim must be one
 21 which arises out of or relates to the defendant's forum-related activities; and (3) the
 22 exercise of jurisdiction must be reasonable. *Yahoo!*, 433 F.3d at 1205. If Plaintiff meets
 23 its burden of satisfying the first two prongs, *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th
 24 Cir. 1990), then the burden shifts to the Individual Defendants to set forth a "compelling
 25 case" that the exercise of jurisdiction would not be reasonable. *Burger King*, 471 U.S. at
 26 476-78.

27 Although it might not be readily apparent from Defendants' Motion, this is a
 28 copyright infringement case, therefore it is proper for the court to evaluate the first prong

1 of the specific jurisdiction analysis using the purposeful availment or “effects” test
 2 expounded in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).
 3 See *Brayton Purcell, LLP, Recordon & Recordon*, 361 F. Supp. 2d 1135, 1140 (N.D. Cal.
 4 2005) (“Brayton I”). In *Calder*, the Supreme Court held that a foreign act that is both
 5 aimed at and has effect in the forum state satisfies the purposeful availment prong of the
 6 specific jurisdiction analysis. To establish personal jurisdiction under the *Calder*
 7 “effects” test, defendant must have (1) committed an intentional act, (2) expressly aimed
 8 at the forum state, (3) causing harm that the defendant knows is likely to be suffered in
 9 the forum state. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

10 Wrongful conduct targeted at a plaintiff whom the defendant knows to be a
 11 resident of the forum state is sufficient to satisfy the *Calder* “effects” test. See *Calder*,
 12 465 U.S. at 789⁸; *Bankcroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F. 3d 1082, 1087
 13 (9th Cir. 2000). An allegation of willful copyright infringement, standing alone, can
 14 satisfy the *Calder* “effects” test if the act is aimed at a known forum resident. *Columbia*
 15 *Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 289 (9th Cir.
 16 2007), rev’d on other grounds, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.
 17 340, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998) (“Columbia alleges . . . that Feltner
 18 willfully infringed copyright owned by Columbia which, as Feltner knew, had its
 19 principal place of business in California. This fact alone is sufficient to establish the
 20 ‘purposeful availment’ requirement.”) (citing *Calder*, 465 U.S. at 789-90). See also

21
 22 ⁸ For example, in *Calder* itself, the defendants were a reporter and an editor of a
 23 nationally-circulated tabloid newspaper whom plaintiff, a well-known California resident,
 24 accused of libel. The defendants argued that the alleged wrong had no intended nexus
 25 with California and that they should be treated like “a welder employed in Florida who
 26 works on a boiler which subsequently explodes in California.” *Id.* The Supreme Court
 27 rejected this proposed analogy, pointing out that “petitioners are not charged with mere
 28 untargeted negligence. Rather, their intentional, and allegedly tortious, actions were
 expressly aimed at California.” *Calder*, 465 U.S. at 789. Defendants attempt to make the
 same argument here as petitioners did in *Calder*, and Defendants’ arguments are likewise
 properly rejected.

1 *Brayton I*, 361 F. Supp. 2d at 1140 (noting that although later cases arguably limited
 2 *Columbia Pictures*' application in other contexts, "absent a clear indication to the
 3 contrary, this court is bound to follow *Columbia Pictures* since it is directly on point
 4 inasmuch as the cause of action here is for copyright infringement.") Here, as discussed
 5 in Section V, below, Plaintiff has alleged sufficient claims for intentional indirect
 6 copyright infringement against these Individual Defendants, therefore the reasoning of
 7 *Columbia Pictures* supports the exercise of personal jurisdiction in this case.

8 Additionally, the *Calder* effects test is satisfied by the presence of facts in the FAC
 9 demonstrating individualized targeting by these Individual Defendants. *Cf. Cybersell,*
 10 *Inc. v. Cybersell, Inc.*, 130 F.3d 414, 420 (9th Cir. 1997) (no showing that defendants
 11 even knew of the existence of the plaintiffs, let alone targeted them individually); *see*
 12 *also Gordy v. Daily News, L.P.*, 95 F.3d 829, 833 (9th Cir. 1996) (distinguishing certain
 13 cases holding that no personal jurisdiction existed under *Calder* on the ground that in
 14 those cases targeting was lacking).

15 Plaintiff has demonstrated purposeful availment by these Individual Defendants
 16 under the *Calder* effects test. First, each of these Individual Defendants acted
 17 intentionally when they published intentionally misleading statements about RDF being
 18 the proprietor of the copyrights in the Works, induced IWI to intentionally reproduce
 19 unauthorized copies of Plaintiff's Works for RDF, materially contributed to IWI's
 20 unauthorized creation of derivative artwork to accompany the DVD packaging of
 21 Plaintiff's Works, sent emails to Plaintiff falsely representing that Plaintiff would be
 22 compensated for the conveying Plaintiff's store inventory and assets to RDF, among
 23 other intentional acts. *See* FAC ¶¶ 16, 19, 20, 21, 24, 26, 27, 28, 29, 36, 43, 44, 45. *See*
 24 *also Marlyn Nutraceuticals, Inc. v. Improvita Health Prods.*, 663 F. Supp. 2d 841, 850-51
 25 (D.Ariz. 2009) (intentional act satisfied based on allegedly fraudulent misrepresentations
 26 in emails directed to plaintiff in forum).

27 Second, these intentional acts were expressly aimed at California because they
 28 individually targeted Plaintiff Upper Branch, a California corporation doing business

1 almost exclusively in California. These Individual Defendants knew Upper Branch's
 2 principal place of business was in Los Angeles, California, knew that Josh Timonen (a
 3 decision maker for Upper Branch) was located in Los Angeles, California, communicated
 4 directly with Mr. Timonen and Ms. Norton in Los Angeles, California, physically took
 5 Plaintiff's store inventory from its office in Los Angeles, California, and obtained written
 6 copyright assignments from Plaintiff in Los Angeles, California, *inter alia*, under false
 7 pretenses. *See, e.g.*, FAC ¶¶ 20, 21, 26, 27, 28, 29, 30, 36. Based on these facts, for
 8 purposes of this Motion and which cannot be disputed by Defendants, it is plain that the
 9 actions of these Individual Defendants were "expressly aimed at the forum state." *Dole*
 10 *Food Co.*, 303 F.3d at 1112. Finally, the harmful effects of those intentional acts were
 11 primarily caused, and felt, as the Individual Defendants knew they would be, in
 12 California.

13 The second requirement for specific jurisdiction is that contacts constituting
 14 purposeful availment must be the ones that give rise to the current suit. This requirement
 15 is measured in terms of "but for" causation. *See Ziegler v. Indian River County*, 64 F.3d
 16 470, 474 (9th Cir. 1995). This requirement is easily met here. But for the intentional
 17 acts, Plaintiff would have no need to bring this suit.

18 The final requirement for specific jurisdiction – reasonableness – is found when
 19 jurisdiction comports with fair play and substantial justice. *See Burger King*, 471 U.S. at
 20 476. *Burger King* explicitly places upon the defendant the burden of demonstrating
 21 unreasonableness and requires the defendant to put on a "compelling case." *Id.* at 476-77,
 22 The reasonableness determination requires the consideration of several specific factors:
 23 (1) the extent of the defendant's purposeful interjection into the forum state, (2) the
 24 burden on the defendant in defending in the forum, (3) the extent of the conflict with the
 25 sovereignty of the defendant's state, (4) the forum state's interest in adjudicating the
 26 dispute, (5) the most efficient judicial resolution of the controversy, (6) the importance of
 27 the forum to the plaintiff's interest in convenient and effective relief, and (7) the existence
 28 of an alternative forum. *Id.*

Individual Defendants attempt no factual showing with regard to the *Burger King* factors. Instead, Individual Defendants state without elaboration that jurisdiction would be unreasonable. Mot. at 12. Dawkins himself previously sued Plaintiff for declaratory relief of ownership of copyright in the Works in California. FAC ¶¶ 41-42. Individual Defendants support this assertion with one citation to a non-precedential 6th Circuit case that has little to do with the facts alleged in the FAC. Mot. at 12. This is inadequate to discharge *Burger King's* requirement that the defendant demonstrate a "compelling case," focused on the seven specific factors listed above, in order to establish unreasonableness. Individual Defendants do not focus on the *Burger King* factors nor apply them to the particular circumstances of this case. Rather, they conveniently ignore them. Therefore, the reasonableness requirement is met. In sum, Plaintiff has satisfied the criteria for specific jurisdiction.

C. In the Alternative, Plaintiff Requests a Continuance of The Matter To Permit Plaintiff To Conduct Limited Jurisdictional Discovery.

If the Court is somehow inclined to grant some or all of Defendants' Fed. R. Civ. P. 12(b)(2) jurisdictional motion, then Plaintiff respectfully requests a continuance of the motion in order to conduct limited jurisdictional discovery. A district court has broad discretion to "permit discovery to aid in determining whether it has in personam jurisdiction." *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977) (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)). A court should allow a party to conduct discovery "where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Id.* at 430 n.24 (citation and alteration omitted). Discovery should be denied only "when it is clear that [the] discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." *Id.* The Ninth Circuit has held that denying jurisdictional discovery where further discovery might demonstrate a basis for jurisdiction is an abuse of discretion. *Harris Rutsky & Co.*, 328 F.3d at 1135 [concluding that the district court abused its discretion in denying plaintiff's motion for

jurisdictional discovery and remanding the case to allow plaintiff the opportunity to develop the record and make a prima facie showing of jurisdictional facts].

Under the circumstances, Plaintiff respectfully submits that such alternative relief is reasonably granted.

IV. THE FIRST AMENDED COMPLAINT CLEARLY STATES CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party.” *Wyer Summit Partn. v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Consequently, there is a strong presumption against dismissal. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 149 (2009) (citation omitted). Plaintiff has easily met its burden here.

V. THE FIRST AMENDED COMPLAINT STATES PROPER CLAIMS FOR DIRECT, VICARIOUS AND CONTRIBUTORY COPYRIGHT INFRINGEMENT UPON WHICH RELIEF CAN BE GRANTED. DEFENDANTS’ MOTION MISCHARACTERIZES PLAINTIFF’S FACTUAL ALLEGATIONS AND THE RELEVANT LAW.

A. Direct Copyright Infringement Claims against Foundation and RDF Store are Sufficiently Pled.

Direct infringement of a copyright requires showing: (a) ownership of a valid registered copyright; and (b) certain unauthorized actions made with respect to that copyright, including reproduction, creation of derivative works, distribution, and display. 17 U.S.C. § 106, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1159 (9th Cir. 2007) (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) and citing 17 U.S.C. § 501(a)). 17 U.S.C. § 106 states, in pertinent part:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; ...

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; ...

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly

Defendants misrepresent the factual allegations of the FAC by arguing spuriously that Plaintiff's claim of copyright ownership is based on, or contingent upon, the alleged fraud of Defendants. Mot. at 20:2-3. On the contrary, the FAC clearly alleges that Plaintiff's copyright ownership in the Works **precedes** the alleged fraud of Defendants. (FAC ¶¶ 13, 15, 16, 21-25.)

To be clear, it is indeed specifically alleged (and was previously conceded by Defendants) that Upper Branch is the owner and author under copyright of the Works. (FAC ¶¶ 13-15, 34; FAC, Exh. A.)

As to two of the Works only, written assignments were executed by Josh Timonen on behalf of Plaintiff, but legal title to these copyrights never passed because no consideration was received by Plaintiff in return, as promised. (FAC ¶¶ 26-33, 35.) Moreover, these written assignments certainly are not "irrevocable," and the Defendants' Motion blatantly mischaracterize this fact as well as the character of the transaction. (Mot. at 20:23.)

There are no allegations in the FAC, because it is false, that Josh Timonen signed on behalf of Plaintiff written copyright assignments transferring Upper Branch's ownership of the remaining thirteen (13) copyrighted Works (which Defendants previously conceded were owned by Plaintiff). Therefore, under 17 U.S.C. § 204(a), it is conclusive that no transfer of these copyrights was effected. 17 U.S.C. § 204(a) (a transfer of ownership of copyrighted material requires a writing to be valid).

Finally, because the infringement allegations arise out of a failed business relationship between Plaintiff and Defendants, *see* FAC ¶¶20-36, this fact tends to

1 indicate that it is easier for these Defendants to discern the content that they are alleged to
 2 have infringed, and the Defendants' assertion that they do not know what they are alleged
 3 to have infringed is a red herring. *See, e.g., Arma v. Buyseason, Inc.*, 591 F. Supp. 2d
 4 637, 644 (S.D.N.Y. 2008). Therefore, Defendants have adequate notice of the way that
 5 Plaintiff's factual allegations align with its asserted legal claims, and the Motion is
 6 properly denied in its entirety.

7 Plaintiff has further alleged that Defendants IWI, and RDF, RDF Store, made
 8 certain unauthorized actions with respect to Plaintiff's copyrights in the Works. (FAC ¶¶
 9 36-52.) Thus, Plaintiff states a claim for direct infringement and the Defendants' Motion
 10 is properly denied in its entirety.

11 **B. Plaintiff's Contributory Infringement Claim Against Defendants Is**
 12 **Sufficiently Pled And The Motion Is Properly Denied In Its Entirety.**

13 A claim for contributory infringement requires a showing that a party "(1) has
 14 knowledge of another's infringement and (2) either (a) materially contributes to or (b)
 15 induces that infringement." *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795
 16 (9th Cir. 2007).

17 **1. Defendants Have Knowledge of the Underlying Infringement.**

18 Here, Defendants plainly have knowledge of the underlying infringement. It is
 19 alleged that Plaintiff created the fifteen (15) copyrighted Works, (FAC ¶¶ 13, 21, 23, and
 20 25,) that Defendants knew Plaintiff owned the copyrights in the Works because they later
 21 attempted to obtain a written assignment for all of the Works (FAC ¶ 16), that Defendants
 22 paid nothing to Plaintiff in exchange for Plaintiff's store assets (including an inventory of
 23 the Works), (FAC ¶ 31,) later persuaded IWI to manufacture unauthorized copies of
 24 Plaintiff's Works for RDF and RDF Store's sale and profit, and that all of these unlawful
 25 acts were done with the approval or authorization of Dawkins. (FAC ¶¶ 45, 47, 88, and
 26 89.) Indeed, Defendants Dawkins and RDF previously unsuccessfully sued Plaintiff in
 27 California for intentional interference with their prospective economic advantage for
 28 instructing IWI's predecessor-in-interest to deny RDF access to its Works. (*See* FAC ¶¶

37, 74, 83.) Such spurious claims were voluntarily dismissed with prejudice. (See FAC ¶¶ 41-42, 74.)

2. Defendants' Materially Contribute To or Induce the Underlying Infringement.

Next, Plaintiff has demonstrated that the Defendants have materially contributed to or induced IWI's, RDF's, and RDF Store's direct infringement.

Again, Defendants attempt to mischaracterize Plaintiff's claim. Plaintiff does not allege in the FAC that the Individual Defendants are "providing means to infringe" in the sense of furnishing a copyrighted work to another, who in turn wrongfully copies from the work. See *Mount v. Book-of-the-Month Club, Inc.*, 555 F.2d 1108 (2d Cir. 1977).

Instead, the FAC alleges that Plaintiff had, during the course of Plaintiff's business relationship with Idea Media Services, LLC, predecessor to Defendant IWI, deposited its masters with Idea Media Services "with advance instruction that from those master copies and files, Idea Media would create and duplicate copies of the Works on a per-order basis as authorized by Timonen or Norton on behalf of Plaintiff." (FAC at ¶ 17, 74, 78.) That "Idea Media knew that only Plaintiff could place orders for (its own) Works, and that no third parties, including the Dawkins Defendants, could place orders for copies of the Works without the express consent and authorization of Plaintiff." (FAC at ¶ 18, 74, 79.) That in June 2010 and again in November 2010, Plaintiff demanded and reiterated to Idea Media Services that RDF did not have authorization from Plaintiff to order copies of the Works directly from Idea Media. (FAC ¶ 37, 74, 83.) That despite this, Idea Media and RDF ignored Plaintiff's assertion of exclusive rights and thereafter committed the acts of direct infringement complained of. (*Id.*)

It is further alleged in the FAC that Dawkins, R. Cornwell and M. Cornwell personally and unlawfully instructed IWI that RDF owned the copyrights in the Works, in order to induce IWI to manufacture unauthorized copies of Plaintiff's Works for RDF. (FAC ¶¶ 45, 74, 88.) Further, these Individual Defendants personally and unlawfully instructed IWI to create unauthorized derivative artwork to attach to the unauthorized

1 duplication of the DVD packaging of Plaintiff's Works, which then were unlawfully sold
 2 by RDF and RDF Store. (FAC ¶¶ 45, 47, 74, 88, 89.) All of the above unlawful
 3 infringement was on-going throughout the litigation that ensued among the parties
 4 starting in 2010 and continuing (FAC at ¶ 41), and Plaintiff now seeks to have this
 5 infringement cease once and for all.

6 The Motion should be denied in its entirety.

7 **C. The Vicarious Infringement Claims Against Individual Defendants**
 8 **State Claims Upon Which Relief Can Be Granted.**

9 A claim for vicarious infringement requires a showing that a party "has (1) the
 10 right and ability to supervise the infringing conduct and (2) a direct financial interest in
 11 the infringing activity." *Visa, supra*, at 802 (footnote omitted).

12 **1. Individual Defendants are personally liable for the conduct of RDF**
 13 **and the RDF Store as each of them exercises a sufficient level of**
 14 **control over RDF and the RDF Store with respect to the infringing**
 15 **activities.**

16 The test for right or ability to supervise infringing requires both "a legal right to
 17 stop or limit the directly infringing conduct . . . [and] the practical ability to do so."
 18 *Amazon.com*, 487 F.3d at 730. It is irrelevant whether a party chooses to exercise this
 19 right; a decision not to supervise does not remove the responsibility to do so. *Visa*, 494
 20 F.3d at 816-17. It is also irrelevant whether the supervised direct infringers could still
 21 infringe through alternative methods even assuming proper supervision is exercised. *Id.*
 22 at 817.

23 In the Motion, Defendants: [1] do not contest that vicarious copyright infringement
 24 is sufficiently pled against the Foundation and the Store; and [2] do not contest that the
 25 first element of vicarious copyright infringement – "the right and ability to supervise the
 26 infringing conduct" (*Visa*, 494 F.3d at 802) – is sufficiently pled as to these Individual
 27 Defendants. (*See Mot.* at 21-22.)
 28

1 **2. *These Individual Defendants Have A Direct Financial Interest in***
 2 ***Underlying Infringing Activity***

3 To establish a direct financial interest in the underlying infringing activity, a party
 4 must demonstrate a "causal relationship between the infringing activity" and a financial
 5 benefit, no matter how small that benefit is to the defendant. *Ellison v. Robertson*, 357
 6 F.3d 1072, 1079 (9th Cir. 2004).

7 Plaintiff's Works serve as a "draw" that brings more attention to Dawkins, and
 8 RDF. These Individual Defendants have actively and materially contributed to and
 9 actively induced the underlying infringement of Plaintiff's Works in order to obtain
 10 greater publicity for Dawkins and RDF. *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d
 11 259, 263-64 (9th Cir. 1996) (finding a swap meet operator liable as a vicarious infringer
 12 for (1) financially benefiting from the infringing activity of another while (2) having the
 13 right and ability to supervise the place where the infringement occurred); *Gershwin*
 14 *Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162-63 (2d Cir. 1971)
 15 (finding a local concert association liable as a contributory infringer for (1) materially
 16 contributing to the public performance of copyrighted works with (2) knowledge that
 17 such performances were infringing).

18 Additionally, the declaration of Robin Cornwell in support of the Ex Parte TRO in
 19 related case CV 12-10694 demonstrates that the ability of RDF to fundraise is directly
 20 related to the availability of these Works, or that these Works increases RDF's "customer
 21 base" and revenue accordingly. (Decl. of R. Cornwell ISO *ex parte* TRO in related case
 22 no. CV 12-10694, ¶19 [Dkt #9 in CV 12-10694].) RDF is alleged to be a direct infringer.
 23 Robin Cornwell is the "Executive Director" of RDF, Michael Cornwell is the
 24 "Operations Manager" of RDF" and RDF is Dawkins' own namesake foundation. All
 25 three of these Individual Defendants derive a financial benefit from RDF's ability to
 26 fundraise from its donors, as it secures their employment and position with the
 27 organization.
 28

1 Here, Plaintiff has met its requirement to plead (a) a causal relationship between
 2 the direct infringement and any benefit to these Individual Defendants; and (b) that the
 3 alleged benefit to these Individual Defendants constitutes a financial benefit within the
 4 meaning of the vicarious liability test. *Visa*, 494 F.3d at 802.

5 Defendants' Motion to Dismiss should be denied in its entirety.

6 **VI. PLAINTIFF'S CLAIM FOR FRAUD STATES A CLAIM UPON WHICH**
 7 **RELIEF CAN BE GRANTED.**

8 Contrary to Defendants' argument, the fraud claim has been alleged with sufficient
 9 particularity to comply with FRCP 9(b). The allegations must be "specific enough to
 10 give defendants notice of the particular misconduct which is alleged to constitute the
 11 fraud charged so that they can defend against the charge and not just deny that they have
 12 done anything wrong." *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). Scienter
 13 may be averred generally, simply by saying that it existed. *See id.* at 1547; *see* Fed. R.
 14 Civ. P. 9(b) ["Malice, intent, knowledge, and other condition of mind of a person may be
 15 averred generally"]. As to matters peculiarly within the opposing party's knowledge,
 16 pleadings based on information and belief may satisfy Fed. R. Civ. P. 9(b) if they also
 17 state the facts on which the belief is founded. *Wool v. Tandem Computers, Inc.*, 818 F.2d
 18 1433, 1439 (9th Cir. 1987).

19 In their Motion, Defendants wrongfully contend that a fraud claim must be pled
 20 with "a high degree of meticulousness." (Motion pg. 12:28). That is not the correct
 21 standard and Defendants are simply mistaken. Rather, this standard refers to the pleading
 22 requirements of the Private Securities Litigation Reform Act, inapplicable here. *Norcal*
 23 *Waste Sys. v. Apropos Tech., Inc.*, 2006 U.S. Dist. LEXIS 58516 *9, fn. 2. In any event,
 24 Plaintiff has alleged in ¶¶129 – 131 of the FAC the "who, what, when, where, and how"
 25 of the alleged fraud in the inducement. The FAC sufficiently alleges "the time, place and
 26 nature of the alleged fraudulent activities" [see *Wool*, 818 F.2d at 1439], and has also
 27 sufficiently alleged "what is false or misleading about a statement, and why it is false" in
 28 compliance with *In re GlenFed, Inc., Sec. Litig.*, 42 F.3d 1541 (9th Cir. 1994). *Id.*

- 1 • The time: Starting in December 2009 (FAC ¶131)
- 2 • The place: Los Angeles (FAC ¶131)
- 3 • The nature of the fraudulent activities: False representations by RDF,
- 4 Dawkins and Robin Cornwell to Plaintiff that “RDF would ‘buy out the
- 5 store’ and provide monetary consideration to Plaintiff and compensate
- 6 Plaintiff for all of its inventory and the costs and liabilities incurred by
- 7 Plaintiff as a result of the conveyance, transfer and assignment of assets to
- 8 RDF. . .” (FAC ¶130).
- 9 • What is false or misleading about a statement and why it is false:
- 10 Fraudulently acquiring Plaintiff’s assets and then selling Plaintiff’s assets to
- 11 the public “without ever having provided the promised monetary
- 12 consideration or compensation to Plaintiff, as promised. . . .” (FAC ¶135).

13 Accordingly, the FAC contains sufficient allegations to maintain a fraud claim against
14 RDF, Dawkins and Robin Cornwell.

15 **VII. THE CLAIMS FOR BREACH OF ORAL CONTRACT AND IMPLIED**
16 **CONTRACT STATE A CLAIM UPON WHICH RELIEF CAN BE**
17 **GRANTED.**

18 In their Motion, Defendants complain that terms of the alleged oral contract and/or
19 implied contract are not sufficiently pled, and that the specific monetary consideration
20 and the assets that are the subject of the oral contract are purportedly not pled with
21 sufficient detail. Defendants also spuriously claim that they do not know which
22 intellectual property works are the subject of the claim, even though all of the copyright
23 registrations to the Works have been attached to the FAC. (FAC ¶ 13; FAC, Ex. A.)
24 However, each and every term does not have to be pled. Fed. R. Civ. P. 8(a)(2) reads as
25 follows: “A pleading must contain a short, plain statement of the claim showing the
26 pleader is entitled to relief and sufficient to put defendants fairly on notice of the claims
27 against them.”
28

Defendants argue that the alleged defects “are not minor nits to be picked despite an otherwise valid claim.” (Mot. at 16:10). But that is precisely what the Defendants have done – they are nitpicking the general factual allegations in the hope of having the entire action summarily dismissed. For example, Defendants take issue with the allegations concerning the amount of monetary consideration that they allegedly agreed to pay for Plaintiff’s assets. (Mot. at 18). However, Plaintiff is not required to state the precise dollar amount of consideration under Fed. R. Civ. P. 8. *Id.* As to the assets that Defendants agreed to purchase, to which they claim ignorance, (*see, e.g.* Mot. at 18:13), Plaintiff specifically alleges, *inter alia*, that Defendants agreed to “buy out the store” (*i.e.* all of the physical inventory), of which Defendants took physical possession. Under the circumstances, it is well within Defendants’ knowledge to know the items of inventory that were taken, and the requirements of Fed. R. Civ. P. 8 have been satisfied here. *Id.*

A. The Statute Of Limitations Does Not Bar The Contractual Claims.

Defendants argue that California’s two-year statute of limitations for breach of oral contract bars the two contractual claims. However, that is not the case. The statute of limitations does not begin to run from time of making oral contract, but from time cause of action accrues or as of date of breach of obligation. *Niles v. Louis H. Rapoport & Sons, Inc.* 53 Cal.App.2d 644, 651, 128 P.2d 50 (1942). Indeed, a contract may contemplate a delay for the repayment of money due on demand, in which case, the statute does not run until actual demand or the happening of the event designated in the contract as the limit of payment. *Greenfield v. Sudden Lumber Co.* 18 Cal. App. 2d 709, 206 P.2d 643 (1937). Moreover, if a plaintiff is lulled into delaying the presentation of her claim by a continuous course of misleading conduct on the part of the defendant, such as promises to pay a debt, estoppel will prevent the defendant from using the statute of limitations to claim that the action is untimely. *Gaglione v. Coolidge* 134 Cal. App. 2d 518, 527, 286 P.2d 568 (1955). Here, Defendants continually delayed payment on repeated assertions of the need for more information so that a figure could be reached and thereafter engaged settlement negotiations continually putting off the falsely promised

1 payment to Plaintiff. (FAC ¶¶ 38, 140, 142). Moreover, to the extent that such
2 exploitation of the Works continues, such ongoing breaches give rise to ongoing
3 damages. Under the circumstances, it is at a minimum a question of fact whether facts
4 supporting estoppel exist here, and the instant motion at this stage of the case cannot be
5 granted.

6 **VIII. CONCLUSION**

7 For all of the foregoing reasons, Plaintiff respectfully submits that the instant
8 Motion is properly denied in its entirety. Alternatively, if the Court is somehow inclined
9 to grant any of the instant Motion, Plaintiff respectfully submits that it should grant
10 Plaintiff leave to amend which, as the Court is aware, “shall be freely given when justice
11 so requires.” Fed. R. Civ. P. 15(a).

12
13 Dated: January 7, 2013

Respectfully submitted,

14 COSTA ABRAMS & COATE, LLP

15
16 By: /s/ Charles M. Coate

17 Charles M. Coate

18 Alan Abrams

19 Attorneys For Plaintiff Upper Branch Productions, Inc.
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DECLARATION OF CHARLES M. COATE

I, CHARLES M. COATE, hereby declare as follows:

1. I am a partner with the law firm of Costa, Abrams & Coate LLP, counsel of record for Upper Branch Productions, Inc. ("Plaintiff"). The matters set forth herein are true and correct and of my own personal knowledge, and if called upon to testify to these matters, I could and would do so competently. I make this declaration in support of Plaintiff Upper Branch Productions, Inc.'s ("Plaintiff") opposition to the motion to dismiss filed by defendants The Richard Dawkins Foundation For Reason And Science (RDF), Richard Dawkins Foundation Store ("RDF Store"); Clinton Richard Dawkins ("Dawkins"), Robin Elisabeth Cornwell ("Robin Cornwell") and Michael Cornwell ("Mike Cornwell") [collectively "Defendants"].

2. On December 13, 2012, my office served Defendants' counsel (Timothy Reynolds, Esq.) a "Notice of Unavailability of Counsel" stating that I would be unavailable from January 2-6, 2013. Attached hereto and incorporated herein as **Exhibit "A"** is a true and correct copy of this document.

3. I attach and incorporate herein as **Exhibit "B"** a true and correct copy of my prior declaration (physically omitting exhibits which are voluminous) but which was submitted in its entirety by Plaintiff and filed as Docket #13 in opposing the *ex parte* application for a temporary restraining order that was filed by Defendant RDF in the related case entitled The Richard Dawkins Foundation for Reason and Science v. Upper Branch Productions, Inc., CV 12-10694-MWF (RZx).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on this 7th day of January 2013, at Santa Monica, California.



CHARLES M. COATE

DECLARATION OF JOSH TIMONEN

I, JOSH TIMONEN, hereby declare as follows:

1. I am over eighteen (18) years of age and am a party to this action. The matters set forth herein are true and correct and of my own personal knowledge, and if called upon to testify to these matters, I could and would do so competently. I make this declaration in support of plaintiff Upper Branch Productions, Inc. ("Plaintiff") opposition to the motion to dismiss filed by defendants The Richard Dawkins Foundation For Reason And Science (RDF), Richard Dawkins Foundation Store ("RDF Store"); Clinton Richard Dawkins ("Dawkins"), Robin Elisabeth Cornwell ("Robin Cornwell") and Michael Cornwell ("Mike Cornwell") [collectively "Defendants"].

2. I met with Richard Dawkins, Robin Cornwell, and Michael Cornwell, in person, on several occasions over the preceding years (between 2006 and 2010), while they were in California either fundraising for RDF or giving talks on related matters and advertising the same on the richarddawkins.net website, a website I created and maintained for Dawkins personally on an independent contractor basis. I reviewed my personal records in order to refresh my recollection concerning the dates of these events and also searched the archives of richarddawkins.net, on which I had catalogued such advertised information prior to the occurrence of the event, at Dawkins' request.

3. On October 28, 2006, I met Dawkins in Los Angeles, California for a lunch meeting before Dawkins attended an event at the California Institute of Technology in Pasadena, California. I advertised this event for Dawkins on richarddawkins.net. See <http://web.archive.org/web/20061031215722/http://www.richarddawkins.net/event,28,Cali-Tech-Beckman-Auditorium>.

4. On October 29, 2006, Dawkins attended an event in Menlo Park, California. I advertised this event for Dawkins on richarddawkins.net. See <http://web.archive.org/web/20080111064855/http://richarddawkins.net/event,52,Keplers-Books-and-Magazines>.

1 5. On October 30, 2006, Dawkins attended an event in San Francisco,
2 California. I advertised this event for Dawkins on richarddawkins.net. See
3 <http://web.archive.org/web/20080110221536/http://richarddawkins.net/> event, 47, The-
4 Palace-of-Fine-Arts.

5 6. On October 30, 2006, Dawkins attended an event in San Francisco,
6 California. I advertised this event for Dawkins on richarddawkins.net. See
7 [http://web.archive.org/web/20080110221536/http://richarddawkins.net/event,47,The-](http://web.archive.org/web/20080110221536/http://richarddawkins.net/event,47,The-Palace-of-Fine-Arts)
8 Palace-of-Fine-Arts.

9 7. On July 14, 2007, Dawkins attended an event at Menlo Park , California. I
10 advertised this event for Dawkins on richarddawkins.net. See
11 [http://web.archive.org/web/20080110221520/http://richarddawkins.net/event,168,Keplers](http://web.archive.org/web/20080110221520/http://richarddawkins.net/event,168,Keplers-Book-Store)
12 -Book-Store.

13 8. On March 8, 2008, Dawkins and Robin Cornwell were in Berkeley,
14 California attending an event, which I also attended. This event was also advertised on
15 Dawkins' website, richarddawkins.net.

16 9. On March 9, 2008, Dawkins and Robin Cornwell attended an event at
17 Stanford University in California. This event was also advertised on Dawkins' website,
18 richarddawkins.net.

19 10. January 24th 2009: Los Angeles, CA. Robin Cornwell attended a meeting
20 and gave a lecture at an event organized by a group called the "LA. Atheist United." I
21 attended that meeting along with Ms. Norton.

22 11. June 2009: Los Angeles, CA. Robin Cornwell gave talk at an organization
23 called the Center for Inquiry (CFI). I am informed and believe that she is now a board
24 member of this organization. I attended that talk by Robin Cornwell on that date.

25 12. On October 5, 2009, Dawkins and Robin Cornwell attended a large
26 fundraising event that was sponsored by RDF in Menlo Park, California. I also attended
27 this event. Prior to this event, I met with Dawkins, Robin Cornwell, and Andy Thomson
28 in Menlo Park, California, and discussed the online store "transfer agreement" in person.

1 Maureen Norton was also present at this meeting. At this meeting, RDF trustees,
2 Dawkins and Cornwell, orally expressed agreement to move forward with the store
3 transition as we describe it.

4 13. In October 2009, Dawkins and Michael Cornwell attended the Atheist
5 Alliance International (AAI) 2009 Conference in Burbank, California. I also attended
6 that conference and discussed various issues with Dawkins and Michael Cornwell
7 pertaining to RDF at such conference. Moreover, this conference was advertised on
8 Dawkins' website, richarddawkins.net.

9 14. On October 6, 2010, Dawkins as a part of his annual US Tour, spoke at the
10 California Institute of Technology in Pasadena, California. I found these facts advertised
11 on Dawkins' website, richarddawkins.net.

12 15. On October 7th 2011, Dawkins was interviewed by the radio station KPFK-
13 FM in Los Angeles on the "The Michael Slate Show." I found these facts advertised on
14 Dawkins' website, richarddawkins.net. See [http://old.richarddawkins.net/videos/643188-](http://old.richarddawkins.net/videos/643188-us-book-tour-details-forrichard-dawkins-the-magic-of-reality)
15 [us-book-tour-details-forrichard-dawkins-the-magic-of-reality](http://old.richarddawkins.net/videos/643188-us-book-tour-details-forrichard-dawkins-the-magic-of-reality).

16 16. On April 4th 2012, Dawkins spoke at University of California at Santa
17 Barbara in Santa Barbara, California, Robin Cornwell also attended that event. I found
18 these facts advertised on Dawkins' website, richarddawkins.net. See
19 <http://richarddawkins.net/events/13#.UMFZ6Y7O1vk>.

20 17. On April 6 2012, Dawkins and Robin Cornwell spoke at an event in San
21 Diego, California followed by a private reception at private home. I found these facts
22 advertised on Dawkins' website, richarddawkins.net. See
23 <http://richarddawkinssandiego.com> and [http://old.richarddawkins.net/articles/645068-](http://old.richarddawkins.net/articles/645068-richard-dawkins-marchapril-2012-us-tour-dates)
24 [richard-dawkins-marchapril-2012-us-tour-dates](http://old.richarddawkins.net/articles/645068-richard-dawkins-marchapril-2012-us-tour-dates).

25 18. April 6, 2012: San Diego, CA. Robin Cornwell spoke at a lecture entitled:
26 "A secular Society." I found this fact advertised on richarddawkins.net. See
27 <http://richarddawkins.net/events/12#.UMFZyo7O1vk>.

1 19. On October 2012, Dawkins & Robin Cornwell lectured at an event in San
 2 Francisco, California, following a \$1,000-per-plate private fundraiser. I found these facts
 3 advertised on Dawkins' website, richarddawkins.net. See
 4 [http://richarddawkins.net/events/2012/10/11/you-areinvited-to-a-private-reception-with-](http://richarddawkins.net/events/2012/10/11/you-areinvited-to-a-private-reception-with-richard-dawkins-adam-savage#.UMFVj6XjPwo)
 5 [richard-dawkins-adam-savage#.UMFVj6XjPwo](http://richarddawkins.net/events/2012/10/11/you-areinvited-to-a-private-reception-with-richard-dawkins-adam-savage#.UMFVj6XjPwo).

6 20. October 7th, 2012: Los Angeles, CA. Robin Cornwell spoke at a lecture
 7 organized by CFI: See <http://www.cfiwest.org/calendar/FeedYourBrain.htm>.

8 21. Future events I found advertised on Dawkins' website, richarddawkins.net:
 9 "An evening with Matt Dillahunty, 1515 Hotel Circle South San Diego CA United States
 10 92108, Sat Jan 12 at 07:00PM to 08:30PM PST." See
 11 <http://richarddawkins.net/events#.UOtfcqz-aSo>.

12 22. Dawkins is a best-selling author who continuously sells books and videos in
 13 California (e.g. through bookstores, the internet, etc.) to California residents, including
 14 the videos in question financed and produced by Upper Branch, and aside from engaging
 15 in RDF fundraising in California (RDF's largest donor is a California resident, Elon
 16 Musk) Dawkins also continues to operate his personal website that intentionally reaches
 17 California (as well as elsewhere) and advertise his and RDF's continual connections with
 18 California.

19 23. Robin Cornwell submitted a declaration in a California State Court action
 20 entitled *Josh Timonen et al. v. The Richard Dawkins Foundation for Reason and Science,*
 21 *et al.*, Los Angeles County Superior Court, Case No. EC 057388. Therefore, it is likely
 22 that she anticipated being called as a witness in California relating to that state court
 23 action. Furthermore, in her declaration, Robin Cornwell admits that she traveled to Los
 24 Angeles, California on July 18, 2011, to attend a mediation in that case. I also attended
 25 that mediation in Los Angeles, California.

26 24. Robin Cornwell was born in California.

27 25. Robin Cornwell advertises that she worked in "the semiconductor industry
 28 in California" on <http://www.darwindaybroward.com/speakers.html>.

1 26. Mike Cornwell has lived and been employed in California for many years.
2 For instance, contrary to the insinuations in his sparse declarations, Mike Cornwell
3 worked at a company called “Form Factor, Inc. from June 2004 – September 2005. That
4 company is located in the Bay Area of Northern California. Mr. Cornwell also worked
5 for a company called “Eyelit” in Fremont California from May 2008 – January 2009. I
6 found this information advertised on Mike Cornwell’s Linked In page online at
7 linkedin.com.

8 27. I am informed and believe that Robin Cornwell and Michael Cornwell were
9 married at one point and they lived in the following California cities: San Jose,
10 Livermore, Mountain View, Menlo Park and Santa Clara.

11 28. In an email that Mike Cornwell wrote to me on or about April 13, 2009,
12 Mike Cornwell wrote, *inter alia*, that “hopefully I’ll be heading out towards California if
13 I’m able to get a contract I’ve been working towards. I’m pretty sure Robin [Cornwell]
14 mentioned that if I’m out in San Jose, I’ll be easily be able to come down for a weekend
15 [to Los Angeles] and we can talk about how I can help with the store stuff in the future . .
16 .”

17 29. In an email that Mike Cornwell wrote to me on or about April 28, 2009,
18 Mike Cornwell wrote, *inter alia*, that “I’m probably (90% likely) going to start a contract
19 in San Jose on May 18th . . . I’ll be in Colorado until probably May 11th then hopefully
20 driving out to California to start work the following week after I find an apartment. I’ll be
21 flying back and forth to Colorado every other week or so like I’ve done for the last 10+
22 years.”

23 30. In an email that Mike Cornwell wrote to me on or about May 12, 2009, Mike
24 Cornwell wrote, *inter alia*, that “I’m in Colorado one more day then am driving out
25 toward California on Wednesday morning. . .”

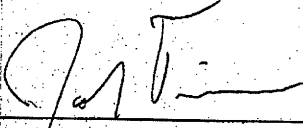
26 31. In an email that Mike Cornwell wrote to me on or about May 18, 2009, Mike
27 Cornwell wrote, *inter alia*, that “It was good to see you, Maureen [Norton], your office
28 and Goldie. Thanks for dinner. Hopefully I’ll sort out where I’ll be and what I’m doing in

1 the next few days. I'm right across from Magic Mountain and will be driving up to the
2 Bay Area tomorrow morning."

3 32. Mike Cornwell also attended various conferences and events in California.
4 For instance, Mike Cornwell and I attended the AAI 2009 Conference that took place in
5 October 2009, in Burbank, California.

6 33. I am informed and believe that Mike Cornwell traveled to the Bay Area,
7 California in March 2010.

8
9
10 I declare under penalty of perjury under the laws of the State of California that the
11 foregoing is true and correct and was executed on this 7TH day of January 2013, at
12 Portland, Oregon.

13 
14 JOSH TIMONEN

1 Alan Abrams, Esq. (SBN: 75637)
2 Charles M. Coate, Esq. (SBN 140404)
3 ccoate@cacllp.com
4 COSTA ABRAMS & COATE LLP
5 1221 Second Street, Third Floor
6 Santa Monica, California 90401
7 Tel: (310) 576-6161
8 Fax: (310) 576-6160
9 Attorneys for Plaintiff
10 Upper Branch Productions, Inc.

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

UPPER BRANCH PRODUCTIONS,
INC., a California corporation,

Plaintiff,

vs.

INNERWORKINGS, INC., an
Illinois corporation; THE RICHARD
DAWKINS FOUNDATION FOR
REASON AND SCIENCE, a
Delaware corporation; RICHARD
DAWKINS FOUNDATION
STORE, a Colorado limited liability
company; CLINTON RICHARD
DAWKINS, an individual residing in
England; ROBIN ELISABETH
CORNWELL, an individual residing
in the State of Colorado; MICHAEL
CORNWELL, an individual residing
in the State of Colorado; and DOES
1 through 10, inclusive,
Defendants.

Case No.: CV12-8789 MWF (RZx)
*Assigned to the Hon. Michael W.
Fitzgerald*

**NOTICE OF UNAVAILABILITY
OF COUNSEL**

Action Filed: October 12, 2012


Ex. 3A

1 **TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF**
2 **RECORD:**
3

4 PLEASE TAKE NOTICE that the undersigned will be out of town and
5 unavailable for the time period of January 2nd through January 6th, 2013. Please
6
7 kindly make a note of the same with regard to scheduling.
8
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10 Respectfully submitted,

11
12 DATED: December 12, 2012

13 By: 
14 Charles M. Coate
15 COSTA ABRAMS & COATE LLP
16 Attorneys for Plaintiff Upper Branch
17 Productions, Inc.
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PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1221 Second Street, Third Fl., Santa Monica, CA 90401. On December 13, 2012, I served the document described as NOTICE OF UNAVAILABILITY OF COUNSEL on the interested parties in this action by email as follows:

Timothy Reynolds, Esq.
 Patrick J. Hagan, Esq.
 Bryan Cave LLP
 120 Broadway, #300
 Santa Monica, CA 90401-2386
 timothy.reynolds@bryancave.com
 patrick.hagan@bryancave.com

Frank A. Konecny, Esq.
 550 Montgomery St., # 200
 San Francisco, CA 94111
 faklaw@sbcglobal.net

☒ **(BY EMAIL)** I emailed the above document to the listed email addresses listed above, and did not receive a notice that such email had not been received.

☒ **(Federal)** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed December 13, 2012, at Santa Monica, California.



 Shian V. Brisbois

1 Charles M. Coate, Esq. (SBN 140404)
2 COSTA ABRAMS & COATE LLP
3 1221 Second Street, Third Floor
4 Santa Monica, California 90401
5 Tel: (310) 576-6161
6 Fax: (310) 576-6160
7 ccoate@cacllp.com

8 Attorneys for Lead Case Plaintiff
9 Upper Branch Productions, Inc.

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA – WESTERN**
12 **DIVISION**

13 THE RICHARD DAWKINS
14 FOUNDATION FOR REASON
15 AND SCIENCE, a Delaware non-
16 profit corporation,

17 Plaintiff,

18 vs.

19 UPPER BRANCH PRODUCTIONS,
20 INC., a California corporation,

21 Defendant.

22 UPPER BRANCH PRODUCTIONS,
23 INC., a California corporation,

24 Plaintiff,

25 vs.

26 INNERWORKINGS, INC., a
27 Delaware corporation; THE
28 RICHARD DAWKINS
29 FOUNDATION FOR REASON
30 AND SCIENCE, et al.

Defendants.

Related Case No.: CV12-10694
CBM (AJWx) *Assigned to District
Judge Consuelo B. Marshall*

**DECLARATIONS OF CHARLES
M. COATE AND JOSH
TIMONEN IN SUPPORT OF
OPPOSITION TO *EX PARTE*
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

[OPPOSITION TO EX PARTE
APPLICATION; MEMORANDUM
OF POINTS AND AUTHORITIES;
AND EVIDENTIARY
OBJECTIONS FILED
CONCURRENTLY HEREWITH]

Lead Case No. CV-12-8789 MWF
(RZx) *Assigned to District Judge
Michael W. Fitzgerald*

DECLARATION OF CHARLES M. COATE

I, CHARLES M. COATE, hereby declare as follows:

1. I am a partner with the law firm of Costa, Abrams & Coate LLP, counsel of record for Upper Branch Productions, Inc. ("Lead Case Plaintiff"). The matters set forth herein are true and correct and of my own personal knowledge, and if called upon to testify to these matters, I could and would do so competently. I make this declaration in support of Lead Case Plaintiff's opposition to the ex parte application for temporary restraining order and preliminary injunction filed by The Richard Dawkins Foundation For Reason And Science (otherwise referred to by the parties as "RDF" or "RDFRS" or "Foundation").

2. Attached hereto as **Exhibit "1"** is a true and correct copy of the complaint that was filed by RDFRS and Clinton Richard Dawkins, as an individual ("Dawkins"), against Josh Timonen, Maureen Norton, and Lead Case Plaintiff Upper Branch Productions, Inc., on October 4, 2010 in the Los Angeles County Superior Court, North Central District, bearing case no. EC054190 (hereafter "EC054190"). Costa, Abrams & Coate LLP was counsel of record for Josh Timonen, Maureen Norton, and Upper Branch Productions, Inc. in EC054190, as well.

3. Specifically, in EC054190, RDFRS and Dawkins in part sought a declaration of ownership of the copyrights in the Works. The complaint in EC054190 alleged in pertinent part:

- "On July 15, 2010, [Timonen, Norton, and Upper Branch Productions's] lawyer, Alan Abrams, Esq., sent an email to [RDFRS and Dawkins'] litigation counsel suggesting that "the RDF[RS] website (which . . . was created by Mr. Timonen) . . . , merchandise using the RDF[RS] logo created by Mr. Timonen, and audio-visual and musical

1 materials created and produced by Mr. Timonen” are all
2 ‘Mr. Timonen’s intellectual property rights’ which have
3 not been transferred or assigned to RDFRS or Dawkins.”
4 (**Exhibit “1,”** at Complaint, Page 9, ¶ 33.)

5 • “In fact, all ‘intellectual property’ Defendant Timonen
6 created for [Dawkins and RDFRS] at all times and for
7 any purpose is a ‘work for hire’ commissioned and paid
8 for by [Dawkins and RDFRS]. Consequently, any
9 copyrights, trademarks or other intellectual property
10 rights pertaining to logos, merchandise, ‘audio-visual or
11 musical materials created and produced by Mr. Timonen”
12 for [the Upper Branch Store, RDFRS or Dawkins] belong
13 to [RDFRS and Dawkins].” (**Exhibit “1,”** at Complaint,
14 Page 9, ¶ 34.)

15 • “An actual controversy has arisen and now exists
16 between [RDFRS and Dawkins] and [Timonen, Norton,
17 and Upper Branch Productions]. [RDFRS and Dawkins]
18 contend all of the intellectual property, logos,
19 trademarks, copyrights, merchandise, music and audio-
20 visual materials [Timonen, Norton, and Upper Branch
21 Productions] created for [RDFRS and Dawkins], any of
22 [the] websites and [the Upper Branch Store] were ‘works
23 made for hire’ that belong to [RDFRS and Dawkins.] . . .
24 (the ‘Contested Rights’).” (**Exhibit “1,”** at Complaint,
25 Page 16, ¶ 77.)

26 • Accordingly, Dawkins and RDFRS requested, *inter alia*,
27 “[f]or a judgment declaring all the Contested Rights
28
29

1 belong to [Dawkins and RDFRS] and invalidating any
2 purported or recorded claim of [Timonen, Norton, and
3 Upper Branch Productions] in or to the Contested
4 Rights.” (**Exhibit “1,”** at Complaint, Page 18.)

5 4. Josh Timonen, Maureen Norton, and Upper Branch Productions
6 sought to transfer EC054190 to federal court on the basis that it appeared from the
7 face of the complaint that RDFRS and Dawkins sought to adjudicate copyright
8 ownership in EC054190. EC054190 was ultimately remanded to the state court.

9 5. Attached hereto as **Exhibit “2”** is a true and correct copy of [RDFRS
10 and Dawkins’] Brief in Support of Court’s Order To Remand Action to State Court
11 (“Brief”). In such Brief, RDFRS and Dawkins specifically stated: “To be clear:
12 **Plaintiffs [RDFRS and Dawkins] expressly renounce any claim to federal**
13 **remedies or relief.** (emphasis in original).” (See **Exh. “2”** at Page 4, lines 1-2.)

14 6. Attached as **Exhibit “3”** is a true and correct copy of the First
15 Amended Complaint (“FAC”) filed by RDFRS and Dawkins against Josh
16 Timonen, Maureen Norton, and Lead Case Plaintiff Upper Branch Productions,
17 Inc. in EC054190.

18 7. Attached as **Exhibit “4”** is a true and correct copy of the Second
19 Amended Complaint (“SAC”) filed by RDFRS and Dawkins against Josh
20 Timonen, Maureen Norton, and Lead Case Plaintiff Upper Branch Productions,
21 Inc. in EC054190.

22 8. Specifically, in EC054190, RDFRS and Dawkins further alleged in
23 the FAC and SAC in pertinent part as follows:

- 24 • “Defendant Timonen agreed when he first started doing
25 any work for the foundation that all IP he created for
26 Plaintiffs [RDFRS and Dawkins] at all times and for any
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1 purpose would belong to RDFRS.” (Exhs “3” and “4”
2 at FAC ¶ 34 and SAC ¶ 34.)

3 • “Even with respect to items of IP for which Defendants
4 [Josh Timonen, Maureen Norton, and Upper Branch
5 Productions, Inc.] did not sign ‘work for hire’ contracts
6 or assignments of copyright, Plaintiffs [RDFRS and
7 Dawkins] have permanent nonexclusive licenses to use
8 and commercially exploit these intellectual property
9 rights for the benefit of RDFRS, by virtue of the parties’
10 conduct and operation of law . . .” (Emphasis Added.)
11 (Exhs. “3” and “4” FAC ¶ 36 and SAC ¶ 36.)

12 • “The conduct of the parties giving rise to Plaintiffs’
13 permanent nonexclusive licenses to Defendants’
14 purported IP include, without limitation, these facts:

15 a. All the disputed IP items were commissioned
16 and paid for by Plaintiffs...

17 d. All of them were created solely and explicitly
18 for Plaintiffs’ benefit . . .”

19 (Exhs. “3” and “4” FAC ¶ 37 and SAC ¶ 37.)

20 9. The above allegations by RDFRS and Dawkins in Paras. 36 and 37 of
21 the FAC and SAC in EC054190 were incorporated into RDFRS’ subsequent
22 claims against Lead Case Plaintiff Upper Branch Productions for breach of
23 contract, breach of the covenant of good faith and fair dealing and intentional
24 interference with its contractual relations with Idea Media (the successor in interest
25 to lead case defendant Innerworkings, Inc.) (See Exhs. “3” and “4”).

26 10. Attached as **Exhibit “5”** is a true and correct copy of a motion to
27 compel further responses to inspection demands and compliance as agreed upon,
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1 and request for sanctions, that was filed by my office in EC054190 on May 13,
2 2011. Its contents were true and correct.

3 11. Attached as **Exhibit "6"** is a true and correct copy of the Notice of
4 Ruling granting in part the motion to compel further responses and request for
5 sanctions that was filed by my office in EC054190 on June 22, 2011.

6 12. Attached as **Exhibit "7"** is a true and correct copy of the Stipulation
7 re: Mediation and Continuance of Filing of Cross-Complaint in EC054190.

8 13. Attached as **Exhibit "8"** is a true and correct copy of a motion for
9 terminating sanctions that was filed by my office in EC054190. Its contents were
10 and are true and correct.

11 14. Attached as **Exhibit "9"** is a true and correct copy of RDFRS and
12 Dawkins' request for dismissal without prejudice of EC054190 dated July 18,
13 2011.

14 15. Attached as **Exhibit "10"** is a true and correct copy of my clients' "ex
15 parte application" to dismiss the SAC in EC054190 with prejudice or to place the
16 motion for terminating sanctions back on calendar. Its contents were and are true
17 and correct.

18 16. Attached as **Exhibit "11"** is a true and correct copy of the reporter's
19 transcript of proceedings that took place in the EC054190 on August 2, 2011. I
20 attended that hearing and this transcript accurately reflects the dialogue that
21 transpired on the record that day.

22 17. Attached as **Exhibit "12"** is a true and correct copy of the request for
23 dismissal with prejudice filed by RDFRS and Dawkins in EC054190 dated July 27,
24 2011.

25 18. Attached as **Exhibit "13"** is a true and correct copy of the Court's
26 Minute Order from EC054190 dated August 2, 2011, wherein the Court granted
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1 the “ex parte application” filed by Josh Timonen, Maureen Norton, and Upper
2 Branch Productions, Inc. and dismissed EC054190 with prejudice.

3 19. Costs were thereafter awarded against RDFRS and Dawkins in
4 EC054190 in favor of Josh Timonen, Maureen Norton, and Upper Branch
5 Productions.

6 20. Attached hereto as **Exhibit “14”** is a true and correct copy of the First
7 Amended Complaint filed by Upper Branch Productions, Inc. against
8 InnerWorkings, Inc., RDFRS, Dawkins, et al. on December 10, 2012 in the United
9 States District Court, Western Division, bearing case no. CV12-8789 MWF (RZx).

10 21. I was informed by Timothy Reynolds of Bryan Cave LLP that the
11 instant application was filed with the Court the morning of December 14, 2012.
12 Despite the fact that Bryan Cave’s counsel of record Patrick Hagan works out of
13 the Santa Monica office approximately three blocks away from my own, this office
14 was not provided full copies of all application papers until approximately 4:00 p.m.
15 Also, despite a number of requests by e-mail as to the case number and judicial
16 assignment of this matter, I was not furnished this complete information by
17 opposing counsel on Friday, December 14, 2012, and I subsequently first learned
18 of the assigned judicial officer by accessing PACER on Saturday, December 15,
19 2012. Under the circumstances, it is my belief that the service of papers in this
20 matter in no way complied with this Court’s Civility and Professionalism
21 Guidelines regarding service of papers (Civility and Professionalism Guidelines at
22 Para. 3 Service of Papers: “We will not serve papers in order to take advantage of
23 an opponent’s known absence from the office or at a time or in a manner designed
24 to inconvenience an adversary, such as late on Friday afternoon or the day
25 preceding a secular or religious holiday.”)

1 I declare under penalty of perjury under the laws of the State of California
2 that the foregoing is true and correct and was executed on this 17th day of
3 December 2012, at Santa Monica, California.

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7 CHARLES M. COATE
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